CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 72.

THOMAS L. HARTIGAN, APPELLANT,

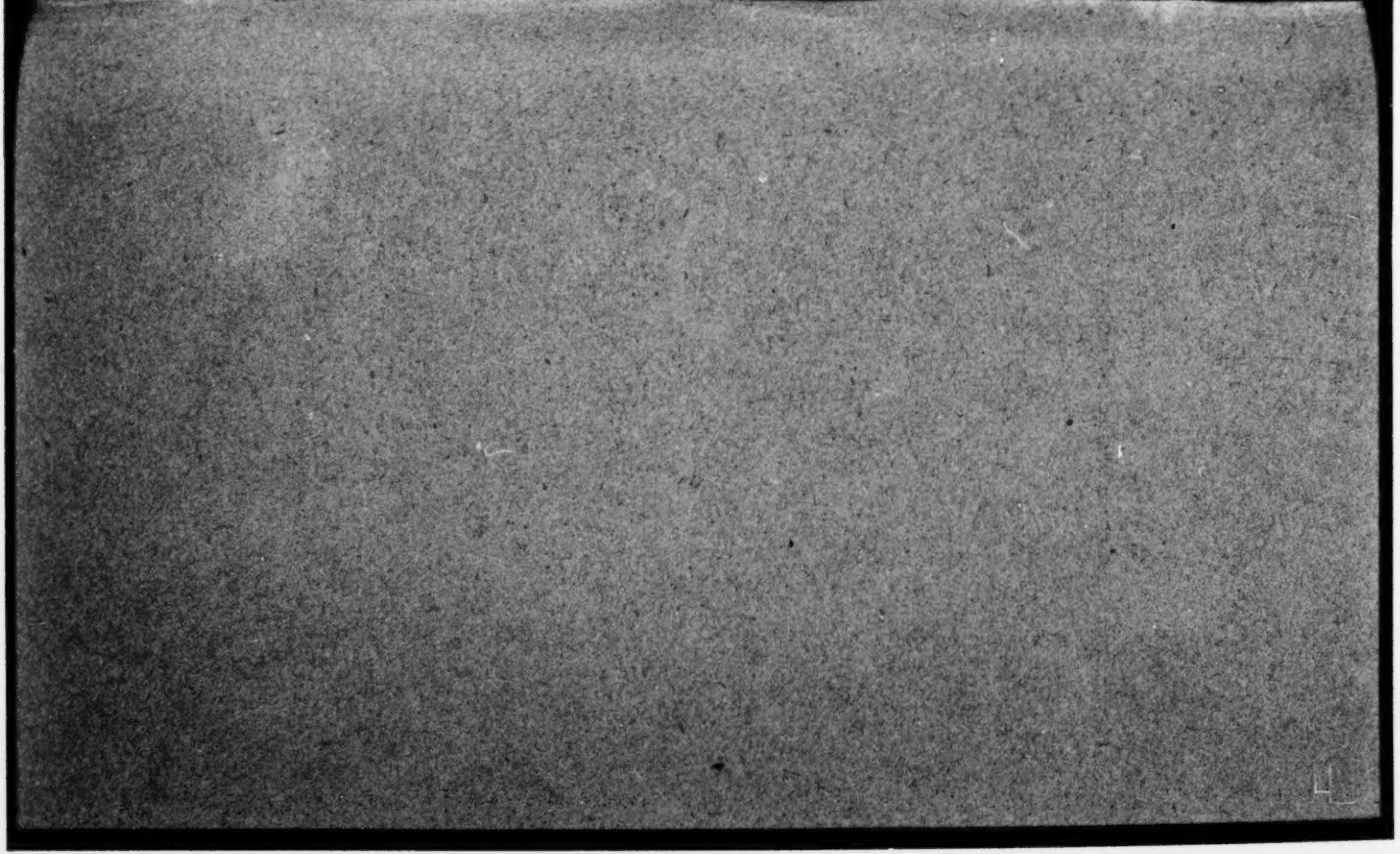
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 20, 1904.

(18,992.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1904.

1 Court of Claims.

THOMAS L. HARTIGAN
vs.
THE UNITED STATES. } No. 16639.

I.—*Petition.*

Filed July 22, 1889. J. R.

To the honorable the Chief Justice and judges of said court:

The claimant, Thomas L. Hartigan, respectfully shows to this honorable court that in the year 1880 he was selected by the President as a candidate for admission to the United States Military Academy from the then second congressional district of the State of Illinois; that, in accordance with said selection, he reported to the superintendent of the Military Academy on the 15th day of June, 1880, and was duly thereafter examined and admitted as a conditional cadet; that after he passed satisfactorily the January examination next ensuing his admittance, he received, as is usual, his warrant of appointment as a cadet from the President, to rank as such from the first day of July, 1880.

That he remained at the Military Academy as such cadet, passing satisfactorily all intervening examinations, and meeting all the requirements of scholarship and conduct, until the 27th day of
2 July, 1883, when, being twenty-two years of age, a member of the highest class, and in the terminal year of his course, he was summarily and most unjustly dismissed from the service of the United States by order of the President on charges telegraphed and written by the superintendent of the Military Academy to the Secretary of War, the nature of which will more fully appear from the following copies of a telegram and subsequent letter:

(*Telegram.*)

WEST POINT, N. Y., *July 24th*, 1883.

Adjutant General, U. S. Army, Washington, D. C.:

On the 21st instant, about 11.30 p. m., Cadet Thomas L. Hartigan, first class, possessed himself improperly of the countersign, and personating the officer of the guard, in conjunction with other cadets, abused and maltreated a new cadet sentinel. In an investigation this morning Cadet Hartigan has three times positively disobeyed my orders under paragraph 106, Academic Regulations. I recommend that he be summarily dismissed.

(Signed) MERRITT, *Supt.*

Claimant is informed that the Secretary of War asked for the details of the offenses, and claimant states that the following communication was then forwarded:

HEADQUARTERS U. S. MILITARY ACADEMY,
WEST POINT, N. Y., *July* 25, 1883.

The adjutant general, U. S. Army, Washington, D. C.

SIR: For the information of the honorable the Secretary of
3 War, I have the honor to make the following report of the circumstances of the abuse and maltreatment of a sentinel on the night of the 21st instant, so far as the circumstances can be learned, and of Cadet Hartigan's complicity in the matter, for which his summary dismissal has been recommended:

The sentinel, a new cadet, was on post for the first time. Between ten and twelve o'clock at night he reports that a number of cadets came on his post, most of them covered so that they could not be recognized, and commenced in various ways to annoy him. Some of them were covered with sheets, personating ghosts, and some having their faces covered carried broomsticks, etc. He, while trying to do his duty as a sentinel, and drive these triflers off his post, called the corporal of the guard, and when the call was answered told the corporal of the disturbance, but the cadets who were annoying him disappeared. When the corporal had returned to the guard tents the annoyance was resumed. About this time, 11.30, a cadet, whom the sentinel recognized afterwards as Cadet Hartigan, approached the post of the sentinel, and when challenged replied, "Officer of the guard." The sentinel, as was his duty, advanced Cadet Hartigan and received from him the countersign. On this Cadet Hartigan corrected the sentinel for advancing him improperly, insisting that he had replied when challenged, "Friend with the countersign," and not "Officer of the guard." After this he talked with the sentinel, attracting his attention until 11.30, at which time, and every half hour during the night, the sentinels announce the hour, adding "All's well." As the sentinel commenced this duty
Cadet Hartigan ordered him to face from camp, and the sentinel
4 obeyed him, when he was suddenly seized from behind by one or more cadets and thrown violently into the deep ditch which surrounds Fort Clinton.

At this time officers made their appearance, and this ended the matter.

In addition to Cadet Hartigan, two other cadets were recognized by the sentinel, one of whom, Cadet Clarke, also of the first class, is not known by the sentinel to have done anything except to move around in the vicinity of the post while the sentinel was harassed. Another, Cadet Williams, of the third class, who was guilty of nothing more, so far as is known, than asking the sentinel improper questions, with a view to annoy and harass him. These last can be, under the regulations, punished by the authorities of the academy.

Cadet Hartigan, by all the evidence obtainable, is guilty of obtaining the countersign, he having no right to it; of arming himself as an officer, and answering "Officer of the guard" to a sentinel, thus making a false statement; of hazing and harassing the sentinel in various ways, and then, after directing the sentinel's attention away from himself and confederates, throwing him, or having him thrown, violently off his post into the ditch of Fort Clinton. In explanation of these charges Cadet Hartigan has refused both to the commandant and myself to make any statement.

In this same connection I would report that inquiries of all cadets seen by officers in the vicinity of the disturbance fail to show who else were guilty beside Cadet Hartigan; every cadet questioned in an investigation under paragraph 106, Academic Regulations, declining firmly but "respectfully" to answer any questions.

I therefore renew my recommendation, made by telegraph
5 yesterday, that under paragraphs 107 and 108, Academic Regulations, Cadet Hartigan be summarily dismissed from the Military Academy.

Very respectfully, your obedient servant,

(Signed) W. MERRITT,
Colonel 5th Cavalry, B'v't Major General
U. S. A., Superintendent.

Claimant received no notice of the charges made to the Secretary of War, and was wholly in ignorance of any being so made until July 28, 1883, when he was informed by the commandant of cadets that he was dismissed the service of the United States, and was given a copy of the dismissal order.

Claimant further states that annexed hereto and made a part hereof are duly certified copies of said telegram and letter, and also a letter from the War Department in response to claimant's request for copies of papers deemed needed in claimant's case, which response necessitates claimant's respectfully asking this honorable court to order requisition made to the War Department in behalf of claimant and for copies of the following papers, to wit:

Appointment of claimant as a cadet from July 1st, 1880.

Order of dismissal, dated July 27th or 28th, 1883.

And claimant further asks that when said copies are obtained, as prayed for, they may be attached hereto and made a part of the record of this case, and that this petition so amended be filed as the petition in this case.

Claimant respectfully submits and relies for relief on this general proposition, which results from the legislation of Congress, and the construction given to that legislation by the courts and judicial officers of the Government, viz:

6 *Without a finding by a general court martial the executive order of my dismissal was illegal.*

The congressional enactments sustaining this claim are as follows:

The 17th section of the act of July 13th, 1866, making appropriations for the military peace establishment provided that "no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of a court martial to that effect, or in commutation thereof."

14 U. S. Stat. at Large, chap. 176, sec. 5.

This section was re-enacted in 1874 in the revision of the statutes.

Rev. Stat., 1874, sec. 1229.

Rev. Stat., 1878, sec. 1229.

In the same revision article 99 of the Articles of War was enacted in the same words, except that the word "mitigation" is used instead of "commutation."

Art. 99, sec. 1342, Rev. Stat. U. S., 1874.

Art. 99, sec. 1342, Rev. Stat. U. S., 1878.

Under the construction given to this section and article of war the status of a cadet at West Point is that of an officer.

The dismissal of claimant without a trial by court martial was therefore illegal.

Claimant respectfully shows that he has persistently endeavored to have the illegal order of his dismissal revoked or declared null and void:

7 On July 29th, 1883, claimant applied to Secretary of War for relief.

On July 30th, 1883, claimant petitioned the adjutant general for relief.

On September 17th, 1883, claimant petitioned Secretary of War for relief.

In June, 1884, claimant petitioned Secretary of War for relief.

The relief asked for in all of these applications was either an examination of the evidence, a revocation of the dismissal order, a court mar*sh*al, or a court of inquiry, but every request for any form of relief was positively refused.

In April, 1888, claimant petitioned the President of the United States for relief, but is informed that no official decision has been given on this application.

Claimant is also informed and believes that after his dismissal and on his behalf a request was made by the corps of cadets and to the superintendent of the Military Academy for a trial of claimant by court mar*sh*al, and claimant is informed that said superintendent, notwithstanding the provisions of section 1326, Revised Statutes U. S., 1874, positively refused said request.

Said section is as follows, and claimant believes that the same is mandatory on the superintendent:

"The superintendent of the Military Academy shall have power to convene general courts-martial for the trial of cadets and to execute the sentences of such courts, except the sentences of suspen-

sion and dismissal, subject to the same limitations and conditions now existing as to other general courts-martial."

Claimant's information and belief that such request was
8 made as stated is evidenced by the certificate of said corps of cadets, hereto attached and made a part of the record of this case.

The claimant deems it proper to state that he was married on the 12th day of February, 1885.

The claimant therefore respectfully prays that by this honorable court the order of his dismissal be declared null and void; that it be declared that he has never been legally separated from the army, and that judgment be rendered against the United States and in his favor for his pay as a cadet of the United States Military Academy from July 27th, 1883, to July 1st, 1889, amounting to thirty-four hundred and seventeen dollars ($3,417.00).

THOMAS L. HARTIGAN, *Claimant.*

(*Copy of Account Sued On.*)

United States in account with Thomas L. Hartigan, cadet, United States Military Academy.

To pay as cadet U. S. M. A., July 27th, 1883, to July 1st, 1885, 1 year 11 months, 4 days, at $540 a year.....	$1,041 00
To pay as cadet U. S. M. A., July 1st, 1885, to July 1st, 1889, 4 years, at $594 ($540 at 10 per cent.) a year.....	2,376 00
Total	$3,417 00

THOMAS L. HARTIGAN, *Claimant.*

STATE OF ILLINOIS, } ss:
County of Cook, }

Thomas L. Hartigan, being duly sworn, deposes and says
9 that he is the claimant in the above-entitled cause; that he is a loyal citizen of the United States and of the State of Illinois; that he has read the above and foregoing petition and copy of account by him subscribed; that the matters and things stated therein are true, except matters and things stated on information and belief, and as to them he believes them to be true; that the telegram and letter therein contained are true copies of the certified copies herewith filed and made a part hereof; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made by him, and that he is justly entitled to the amount therein claimed from the United States after allowing all just credits, deductions, and offsets.

THOMAS L. HARTIGAN.

Subscribed and sworn to before me this 17th day of July, 1889.

[SEAL.] FRANK FOSTER,
Notary Public.

STATE OF ILLINOIS, }
Cook County, } ss:

I, Henry Wulff, clerk of the county court of Cook county, the same being a court of record, do hereby certify that Frank Foster, Esq., whose name is subscribed to the annexed jurat, was, at the time of signing the same, a notary public in Cook county, duly commissioned, sworn, and acting as such, and authorized to administer oaths; that I am well acquainted with his handwriting, and I verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Chicago, in the said county, this 20th day of July, 1889.

[SEAL.] HENRY WULFF, *Clerk.*

10 II.—*Traverse. Filed August* 10, 1889.

In the Court of Claims of the United States, December Term, A. D. 1888.

THOMAS L. HARTIGAN }
vs. } No. 16639.
THE UNITED STATES. }

And now comes the Attorney General on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney General.

11 III.—*Findings of Fact and Conclusion of Law. Filed March 9, 1903.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant, Thomas L. Hartigan, entered the United States Military Academy as a cadet on the 1st day of July, in the year 1880, having previous to his admission as a cadet as aforesaid, to wit, on the 30th day of June, 1880, taken the following oath:

"I, Thomas L. Hartigan, of the State of Illinois, having been appointed a cadet in the Military Academy of the United States, do hereby solemnly swear that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted or attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear that to the best of my knowledge and ability I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.

(Signed) "THOMAS L. HARTIGAN.

"Sworn and subscribed to at West Point, New York, this thirtieth day of June, eighteen hundred and eighty, before me.

[SEAL.] (Signed) "WM. WARD,
"*Notary Public.*"

12 II.

The claimant, after having passed his first semiannual examination, received the following certificate of appointment:

"To all whom it may concern:

"Know ye, that the President has been pleased to appoint Thomas Leonard Hartigan a cadet of the United States Military Academy, to rank as such from the 1st day of July, 1880.

"Given under my hand and seal at the War Department this tenth day of February, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and fifth.

"ALEX. RAMSEY,
"*Secretary of War.*

"R. C. DRUM,
"*Adjutant-General.*"

And on the 12th of February, 1881, he entered into the following contract with the defendants:

"UNITED STATES MILITARY ACADEMY.

"I, Thomas Leonard Hartigan, of the State of Illinois, aged nineteen years one month, having been selected for appointment as a cadet in the Military Academy of the United States, do hereby engage, with the consent of my father, in the event of my receiving such appointment, that I will serve in the Army of the United States for eight years, unless sooner discharged by competent authority. And I, Thomas Leonard Hartigan, do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States paramount to any and all allegiance, sovereignty, or fealty I may owe to any State, county, or country whatsoever; and that I will at all times obey the legal orders of my superior officers, and the rules and articles governing the armies of the United States."

III.

The said claimant served as a cadet as aforesaid from the 1st day of July, 1880, until the 27th of July, 1883, on which day he was summarily dismissed from the Military Academy, by order of the President, upon the charges of maltreating a new cadet upon guard, personating an officer of the guard, making an improper use of the countersign, and disobedience of orders.

IV.

After the dismissal, on July 27, 1883, of the claimant, George William Kirkman was appointed a cadet at the United States Military Academy, from the third congressional district of Illinois, on June 15, 1884, to succeed the said claimant, and that the said George William Kirkman was graduated from the academy and appointed during a recess of the Senate to be second lieutenant in the First regiment of infantry, United States Army, June 12, 1889; and that
he was nominated to the Senate December 16, 1889, for the
13 appointment of second lieutenant, dating from June 12, 1889;
that the nomination was confirmed by the Senate December
20, 1889, and that he was commissioned by the President, accord-

ingly, January 7, 1890, to rank from June 12, 1889; and that the said George William Kirkman is now a captain in the Twenty-fifth regiment of infantry, United States Army.

V.

Sometime between July 27, 1883, the date of claimant's dismissal from the United States Military Academy, and March 5, 1888, the date of claimant's first petition to the President, the said claimant intermarried with some person whose name is not shown by the record.

VI.

The claimant, July 30, 1883, addressed a statement and petition to the Adjutant-General of the Army, requesting reinstatement, or a trial by court-martial, and on the 3d day of August following he addressed a petition to the Secretary of War requesting reinstatement. The statements and requests so made by the claimant asserted his innocence of the charges made against him, but the statements were not verified. April 21, 1888, the claimant, through the Secretary of War and by the hand of Senator Shelby M. Cullom, presented a petition to the President of the United States asking for a revocation of the order of his dismissal, and the issuing of an order for his trial before a court-martial, and an order assigning and appointing him in the army as of the date of the assignment of the lowest graduate of his class. All these petitions and requests were denied.

VII.

The salary of a cadet at the time the claimant was dismissed was $540 a year, which for 6 years would amount to $3,240. That $4 a month is held back from a cadet under the regulations of the academy for the benefit of the equipment fund. That amount for three years would be $144, making the total amount claimed as due to the claimant $3,096, none of which has been paid to him.

Conclusion of Law.

Upon the foregoing findings of facts the court decides, as a conclusion of law, that the claimant can not recover, and his petition should be dismissed.

14 IV.—*Opinion of the Court.*

WRIGHT, *J.*, delivered the opinion of the court:

The claimant having been appointed by the President, July 11, 1880, a cadet in the Military Academy, served as such until July 27, 1883, when he was summarily dismissed by order of the President,

upon charges of maltreating a new cadet while the latter was performing guard duty, personating an officer of the guard, improper use of the countersign, and disobedience to orders. Subsequent to his dismissal a successor was appointed to the place so vacated, who afterwards graduated from the academy, and was later, by and with the advice and consent of the Senate, appointed a second lieutenant in the army, and this suit is brought to obtain the decree of this court, declaring the order of dismissal null and void, and for a judgment against the United States for $3,417, the pay of a cadet from July 27, 1883, to July 1, 1889.

The question presented for our decision is whether the President may summarily so dismiss a cadet without first obtaining the sentence of a court-martial under the provisions of the statutes, Articles of War, and Army Regulations, by which the military establishment of the United States is governed.

The contention of the claimant is that the provisions of sections 1229 and 1342 of the Revised Statutes is a limitation upon the powers of the President in such cases, wherein it is enacted, in effect, that no officer shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial. By article 99, section 1342, above referred to, it is declared that the word "officer," as used by the legislative department, shall be understood to designate commissioned officers; the word "soldier" shall be understood to include noncommissioned officers, musicians, artificers and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by courts-martial.

We are referred to Babbitt *v.* The United States (16 C. Cls. R., 202) as establishing the status of a cadet to be that of an *uncommissioned* officer, and from that it is argued that the cadet therefore, being an officer, falls within the prohibition of dismissal without the sentence of a court-martial. The effect, however, of that decision, carried to its logical sequence, would result in the conclusion that a cadet is not an officer within the meaning of the legislation referred to, because he is uncommissioned. The decision in the case of Morton *v.* United States (19 C. Cls. R., 200) is also referred to, to sustain the insistence that the term of a cadet is to be considered as part of the service in the army in determining the right of an officer to longevity pay; but there the nature of the duties of a cadet was distinctly differentiated from that of ordinary soldiers. That a cadet is in some kind of service—has duties to perform under orders of superiors—is not to be questioned by anyone who knows anything about the work, physical and mental, that he has to do and the character of military authority and discipline to which he is subject. No private soldier is more in service than a cadet, though the character of the two services are quite different. The statute (sec. 1322) prescribes the rights and duties of cadets. They shall be arranged into companies according to the directions of the superintendent, each of which shall be commanded by an officer of

the army, for the purpose of military instruction. To each company shall be added four musicians. The corps shall be taught and trained in all duties of a private soldier, noncommissioned officer, and officer; shall be encamped at least three months in each year, and shall be taught and trained in all duties incident to a regular camp, and (sec. 1323) shall be subject at all times to do duty in such places and on such service as the President may direct.

It therefore seems plain to us, by reference to the statutory provisions above recited, what the rights and duties of a cadet consist of, and the nature of the same, consisting merely in such as are included in and incident to military instruction, drill and discipline, and training in such as appertain to the duties of a private soldier, noncommissioned officer, and officer. It is true they are subject at all times to duty in such places and such service as the President may direct, but, following the general rule by which statutes are construed, this general power of the President to assign to duty in such places and services as he may direct would be controlled by the previous specific description of the nature of such duties and services, and such duties would therefore fall in the specific class of those relating to instruction, drill, and discipline. It is not therefore believed the President, under that section of the statute, would assume to assign duty to cadets requiring them to participate in actual war, although, by virtue of the powers given by the Constitution to the Commander in Chief, he has repeatedly assigned cadets, both army and navy, to active military operations beyond the confines of the academy.

Hence, if our reasoning is sound (and upon this point we feel assured) the rights and duties of a cadet are not the same as those of privates, noncommissioned officers, and officers, but at the same time the cadets are serving in the army and are part of the regular establishment, and may, we think, be described as candidates merely for commissioned officers, and therefore do not fall within the prohibition of the statute forbidding dismissal in times of peace unless in conformity with the sentence of a court-martial. These appointments are made by the President, without the advice and consent of the Senate, and it seems to us plain that Congress did not intend by any legislation that has been enacted to withhold from him the power of summary dismissal for the good of the academy, for such a power can wisely be left to his discretion. In truth, when sections 1325 and 1326 of the Revised Statutes are considered together, it would seem that the intention of Congress was to reserve the power of summary dismissal to some one in authority. And who more properly and wisely than the President could administer such authority? By section 1325 it is provided that no cadet who is reported as deficient in either conduct or studies, and recommended to be discharged from the academy shall, unless upon recommendation of the academic board, be returned or appointed to any place in the army before his class shall have left the academy and received their commissions. It is clear from the record here that claimant

was deficient in conduct, for which he was dismissed, and, as we think, in conformity to the law we have recited. By the other section of the statute above numbered the superintendent of the academy is given power to convene general courts-martial for the trial of cadets and to execute the sentences of such courts, except sentences of suspension and dismission; and the latter exception we think is reserved for the President, who is not limited in his authority by the provision of the section.

Without such power of summary dismissal being vested somewhere in the conduct and management of colleges, and such is the academy in its nature, we think it within the observation of everyone, the lack of proper discipline and deportment would be the common fault of all and thereby greatly lessen the value and efficiency of such institutions. We can not believe, therefore, that it was the intention of Congress to withhold from the Executive this most salutary and effective means of enforcing order and discipline, common to all institutions of learning throughout the land.

It follows from the views we have expressed that claimant is not entitled to the relief and judgment that he seeks, and his petition will be dismissed.

16 V.—*Judgment of the Court.*

THOMAS L. HARTIGAN
vs.
THE UNITED STATES. } No. 16639.

At a Court of Claims held in the city of Washington on the 9th day of March A. D. 1903 judgment was ordered to be entered as follows:

The court on due consideration finds for the defendants and do order, adjudge and decree that the petition of the claimant Thomas L. Hartigan be dismissed.

BY THE COURT.

17 VI.—*Application for and Allowance of Appeal.*

THOMAS L. HARTIGAN
v.
THE UNITED STATES. } No. 16639.

The claimant above named hereby makes application for an appeal to the Supreme Court of the United States from the judgment of this court, rendered March 9th, 1903, dismissing his petition. The claimant assigns as error the conclusion of law which the court reached and the judgment of the court dismissing his petition. The claimant is advised, and therefore assigns, that the court on the

facts found should have reached an opposite conclusion of law and should have rendered judgment for the claimant in the sum of three thousand, two hundred and forty dollars ($3,240).

For the reasons above stated the claimant asks that this, his application for appeal, be allowed and a transcript of the pleadings in the case and of the final judgment be made and duly certified.

THOMAS L. HARTIGAN,
By DUDLEY AND MICHENER,
His Attorneys of Record.

Filed May 5, 1903.

JUNE 1, 1903.

Ordered that the foregoing application for appeal to the Supreme Court of the United States be allowed as prayed for.

BY THE COURT.

18 Court of Claims.

THOMAS L. HARTIGAN
vs.
THE UNITED STATES. } No. 16639.

I, John Randolph assistant clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 10th day of June A. D. 1903.

Seal Court of Claims.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18,992. Court of Claims. Term No. 72. Thomas L. Hartigan, appellant, *vs.* The United States. Filed June 29th, 1903. File No. 18,992.

FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THOMAS L. HANTIGAN, Appellant,
vs.
THE UNITED STATES.
No. 72.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THOMAS L. HARTIGAN,
vs.
THE UNITED STATES. } No. 72.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

This case was filed in the Court of Claims on the 22d day of July, 1889. The petition is on pages 1 to 6 of the Record.

Appellant was appointed a cadet in the military academy July 1, 1880, having on the day previous taken the oath of office, which is copied in Finding 1, Rec. 7. Having passed his first semi-annual examination, he received a certificate of appointment February 10, 1881, and two days later he entered into contract with the United States, both as set forth in Finding II; Rec. 7, 8.

Appellant served as a cadet from July 1, 1880 to July 27, 1883, when he was summarily dismissed by order of the President upon the charge of maltreating

a new cadet on guard, personating an officer of the guard, making an improper use of the countersign, and disobedience of orders. Finding III; Rec. 8.

On the dismissal of appellant, another cadet was appointed to succeed him, and that cadet was graduated from the academy and appointed to be second lieutenant in the army of the United States in 1889, which nomination was confirmed by the Senate and he was duly commissioned by the President, January 7, 1890, and is now an officer in the army. Finding IV; Rec. 8.

Appellant, July 30, 1883, addressed a statement and petition to the Adjutant General requesting reinstatement or trial by court-martial, and on the 3rd day of August, 1883, he addressed a petition to the Secretary of War requesting reinstatement; subsequently, he caused a petition to be presented to the President asking for a revocation of the order of dismissal, the issuing of an order for his trial before a court-martial, and an order assigning and appointing him in the army as of the date of the assignment of the lowest graduate of his class.

These papers all asserted his innocence of the charges made against him. All these petitions and requests were denied.

The salary of a cadet at the time appellant was dismissed was $540 a year, and he sues for that salary during the period of six years. Finding VII; Rec. 9.

The court below ordered that the petition should be dismissed and the appeal is from that judgement. Rec. 12.

ARGUMENT.

We submit that the questions to be considered in this case are:

1. Was the appellant an officer of the United States in the Constitutional sense of the word?

2. Did the President have the power to dismiss the appellant from the military academy without a trial by court-martial?

3. Does the action lie as it is brought?

I.

Was the appellant an officer in the constitutional sense?

1. In sec. 2, art. 2, of the Constitution, it is provided that:

"Congress may by law vest appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

The President is given the power by sec. 1315, Rev. Stat., to appoint cadets in the military academy, and it was pursuant to that authority that appellant was appointed and the certificate of appointment issued to him by the Secretary of War.

It is evident that it was the legislative purpose to treat membership in the corps of cadets at the military academy as one of the "inferior officers" whose appointment was vested in the President by the provision of the Constitution we have quoted.

It is also evident that it was the legislative purpose that such cadets should have official status, for they

had to take and subscribe an oath to support the Constitution and obey the legal orders of superior officers, Sec. 1320. If a cadet were not an inferior officer there would be no occasion to use the words "my superior officers" and "office" found in the oath. Each cadet was required to sign articles, such as the paper copied in Finding II, Rec. 7, in which he agreed to serve in the army of the United States for eight years unless sooner discharged by competent authority. Those articles also contained an oath of office in the language of the oath prescribed by sec. 1320.

It is provided, also, that "cadets shall be subject at all times to do duty in such places and on such service as the President may direct." Sec. 1323. They are subject to trial by general courts-martial to be convened by the superintendent, subject to the same limitations and conditions existing as to other general courts-martial. Sec. 1326. They receive an annual salary. Sec. 1339.

It is held in *United States* vs. *Morton*, 112 U. S., 1, 3–7, that the corps of cadets is a part of the army, and that service as a cadet is actual service in the army of the United States. Statutes from the foundation of the military academy are reviewed in the opinion written by Mr. Justice Blatchford.

All the elements necessary to make a constitutional officer are found in the laws and decisions relating to these cadets, and it follows that their *status* is that of "officers" in the constitutional sense of the word. "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emoluments, and duties." *United States* vs. *Hartwell*, 6 Wall., 385, 393. The statutes relating to military cadets

embrace the ideas of tenure, duration, emoluments, and duties, as a reading of them will show, and they require cadets to take oaths and sign contracts which speak of their *status* as "officers." These statutes, oaths, and contracts put it out of the power of the United States to deny in a court of justice that cadets are officers.

2. We find parallels in the law relating to cadets or midshipmen in the naval academy. Rev. Stat., sec. 1511–1528. They are appointed by the Secretary of the Navy, sec. 1514, and they must agree to such regulations as the Secretary may prescribe. Sec. 1515. A course of fixed duration is prescribed. Sec. 1520, 1524. When they have passed the examination at the academy they receive appointments as midshipmen or cadet engineers. Sec. 1521, 1523. They are paid an annual salary.

The legislation relating to naval cadets is meager as compared with that relating to military cadets. No provision is made for oaths or courts-martial. In several other respects the statutes relating to naval cadets are very inadequate as compared with the statutes governing cadets in the military academy, yet the courts all hold that naval cadets are constitutional officers in the navy. *United States* vs. *Baker* 125 U. S. 646, where the subject was carefully considered.

In *Fitzpatrick* vs. *United States*, 37 C. Cls., 332, while claimant was a naval cadet, and on leave of absence at his home in New Orleans, he was ordered to League Island for duty, and when his services were no longer needed there he was ordered back to New Orleans. The accounting officers refused to allow him mileage for the journey from New Orleans to Phila-

delphia, but they allowed him constructive mileage from Annapolis to Philadelphia. The court held that the claimant was a naval officer within the statutes of the United States allowing naval officers traveling expenses when under orders. A cadet at the naval academy, and while he is pursuing his education there, is serving as such officer. The court was considering the act of March 3, 1883, 22 Stat., 473, which provides that "All officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both," * * *.

It was held that the claimant was within the language and purview of the act. The statutes and decisions were reviewed at length. The court planted itself on sec. 2, art. 2 of the Constitution, and held that Congress had vested the appointment of such cadets in the Secretary, and that when thus appointed they became officers in the navy, citing *Perkins* vs. *United States*, 20 C. Cls., 438, and other cases.

In the *Perkins case*, the claimant was a cadet engineer, and while undergoing instruction he was honorably discharged by the Secretary, against claimant's will, he not having been found deficient in examination, nor dismissed for misconduct under the provisions of sec. 1525, or upon and in pursuance of a sentence of a court-martial. The Court of Claims, held that he was a Constitutional officer in the navy, and that the Secretary had no power to discharge him. Therefore, he was still an officer in the navy and entitled to his pay. The case came to this court, where it is reported in 116 U. S., 483. and the views of the court below were adopted and its judgment affirmed.

In *Jasper's case*, 38 C. Cls. 202, it was held that a cadet midshipman, is an officer in the navy while

pursuing his studies at the naval academy. Why is not a cadet at the military academy an officer in the army while he is pursuing his studies there?

As was said of a passed assistant engineer in the navy, in *United States* vs. *Hartwell*, 95 U. S. 760, 763, so it may be said of the appellant: "The place has every ingredient of an office and we have seen the appellee appointed to it. * * * A thing may be within the letter of a statute and not within its meaning; and it may be within the meaning though not within the letter."

The ruling there was that the claimant was an officer in the navy, legally appointed.

In *United States* vs. *Cook*, 128, U. S., 254, appealed from the Court of Claims, claimant was a cadet at the naval academy where he graduated in 1879. He claimed additional pay under the act which declared that "All officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both," * * * The Government claimed that he did not serve either as an officer or enlisted man while a student at the academy and therefore was not an officer within the sense of the act. After quoting from the case of *United States* vs. *Baker*, 125 U. S., 646, and adhering to the views there expressed, Mr. Justice Bradley said: "That a midshipman is an officer has been understood ever since there was a navy. He is not one of the common seamen. His name indicates a middle position, between that of a superior officer and that of a common seaman." P. 256.

So, in the case at bar, we may justly say that a cadet at the military academy is an officer has been understood ever since we had an army. He is not an

enlisted man. The statutes and his name indicate that he occupies a position between the common soldier and the superior officer.

Thus we bring the appellant clearly within the constitutional and statutory provisions relating to the appointment and the government, as well as the rights, duties, powers and privileges, of officers in the army of the United States including military cadets. *If not within their letter, he is clearly within their meaning.*

We submit that it is far more important to the individual, the public and the army, that the officer shall be made secure of his place or office in the army than that he shall be secure of his pay, emoluments or money privileges. The cases that have been cited show that the courts have not been reluctant in declaring what the rights of such officers are in mere money matters, but we submit that there is a question here involved of far greater moment than any question can be which involves only an amount of money. If the President has not been clothed with the power of dismissing a cadet in the way this appellant was dismissed from the army, the existence of such power should be denied in plain and unequivocal language by the courts.

II.

Has the President the legal authority to dismiss a cadet in the military academy in time of peace, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof?

1. *We answer the question in the negative.*

The concluding sentence of sec. 1229, Rev. Stat., is in these words :

"That no officer in the military or naval service shall in time of peace be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

This section is a part of Chapter I, Title XIV—The Army. There are five more chapters in that title, all relating to the army, viz: Chapter II, Retirement; Chapter III, Pay and Allowances; Chapter IV, The Military Academy; Chapter V, Articles of War; Chapter VI, Military Prison.

These chapters comprise the body of the law establishing and governing our regular army in all its parts, and sec. 1229 is a part and parcel of that body of laws.

The language we have quoted was taken by the compilers of the Rev. Stat. from section 5 of the act of July 13, 1866, 14 Stat., 92, which act made appropriations for the support of the army for that fiscal year, and it was put in that act at the time when the Congress was engaged in restricting the powers of the President, and in denying the existence of powers which he was then asserting. *Blake* vs. *United States* 103 U. S. 227, 230, 234, 237, opinion by Mr. Justice Harlan, stating the facts in detail.

Up to the time of the enactment of sec. 1229 it had been held that the President had the power to remove army officers, not cadets in the military academy alone, or inferior officers alone, but army officers of whatever rank. It was asserted that this power of removal was in the President, was discretionary in character, and that his action could not be reviewed. *Gratiot's case*, 1 C. Cls. 258; 2 Story on the Constitution, sec. 1537.

These authorities show the nature of the evil which Congress sought to remedy by the enactment of sec. 1229. Congress determined and enacted that the President should no longer exercise the power of discretionary or arbitrary removal of an officer of the army or navy. This statute limited the power of the President to dismiss such officers; it denied his jurisdiction in such cases, and made him an executive officer only. In *McBlair's case*, 19 C. Cls. 528, 541, the court, speaking through Judge Weldon, said:

"While the President is made commander-in-chief by the Constitution, Congress have the right to legislate for the army, not impairing his efficiency as such commander-in-chief, and when a law is passed for the regulation of the army, having that constitutional qualification, *he becomes as to that law an executive officer, and is limited in the discharge of his duty by the statute.*"

This statute is of comparatively recent origin. It is broad and comprehensive in its scope. It applies to both the army and navy, and it prohibits the dismissal of any officer unless he shall have been convicted on a trial before a court-martial. It is a denial of authority and a grant of protection. So far as it relates to the President, it is a negative statute.

In Sutherland on Statutory Construction, sec. 203, the learned author treats of such statutes as follows:

"Sec. 203. A *negative* statute is one expressed in negative terms. And here the rule prevails that if a subsequent statute, contrary to a former, has negative words, it shall be a repeal of the former; and a negative statute, it is said too, so binds the common law that a man cannot afterwards have recourse to the latter. Of this form and nature is this provision generally found in the statute of limitations: 'No acknowledgment or promise is sufficient evidence of a

new or continuing contract, by which to take the case out of the operation of this statute, unless the same is contained in some writing signed by the party to be charged thereby.' Negative words make a statute imperative."

Tested by the above rules it becomes plain that sec. 1229, is negative and imperative, operating to repeal all previous statutes within the scope and purview of its language, and throwing its protecting arms about this appellant. There was no court-martial; there was no lawful dismissal in this case.

The interpretation of sec. 1229 was the question considered by this court in *Blake* vs. *United States*, 103 U. S., 227, 235, and it was held, Mr. Justice Harlan speaking for the court, that it meant the President should not "thereafter, in time of peace, exercise such power of dismissal, except in pursuance of a court-martial sentence to that effect, or in commutation thereof."

This is exactly the interpretation for which we are contending here.

(2.) *The law provided a military tribunal by which appellant could have been tried.*

It is enacted in sec. 1326 that "The superintendent of the military academy shall have power to convene general courts-martial for the trial of cadets and to execute the sentence of such courts, except the sentence of suspension and dismission, subject to the same limitations and conditions now existing as to other general courts-martial."

The superintendent was given power by this statute to convene general courts-martial for the trial of cadets and to execute the sentences of such courts, except the sentence of suspension and dismission.

Such sentences could only be executed by the President. Sec. 1229, Rev. Stat.; Arts. of War, 71–114.

Sec. 1326 was passed March 3, 1873, (17 Stat. 604) long after sec. 1342 and its Articles of War, and seven years after the enactment of sec. 1229.

It is not for the courts to presume that Congress did an idle or foolish thing or that there was no sufficient purpose in this new legislation. It was evidently the determination of Congress that this subject was and should remain out of the realm of, and free from the restrictions and limitations of, sec. 1342, and its appended Articles of War, on a footing of its own as a distinct and separate statute. Had Congress desired to put this subject under the control of the narrow provisions of sec. 1342 and the Articles of War, it would have been enough to amend the beginning of that section or Art. 99, and the fact that such amendment was not made is clearly indicative of the legislative purpose that the subject was worthy of and should receive treatment in a separate enactment.

One does not have to go far to find the reason. Section 1342 and its Articles of War do not cover cadets. That section begins with the declaration that "the word 'officer' * * * shall be understood to designate commissioned officers;" * * * Cadets in the military academy are not commissioned officers; therefore, they could not be court-martialed as such. Congress did not intend that cadets should be classed as "non-commissioned officers, musicians, artificers, and privates, and other enlisted men," and so sec. 1326 became a law March 3, 1873. That section established a military court for the correction of cadets, and gave them the protection of sec. 1229, thus putting it out of the power of the President to

remove them without the sentence of a court-martial.

If it should be urged that the court-martial spoken of in sec. 1229 is a court-martial to be held under the Articles of War, we would say that it may be the case so far as officers, generally speaking, are concerned, but the court-martial spoken of in that section may just as well be, and of necessity must be in the case of a cadet, the one authorized by sec. 1326. The language applies to future, as well as to existing courts-martial, or laws creating them.

If the court-martial authorized by the latter section is covered by the language of sec. 1229, as we think it is, then it is perfectly clear that this case is to be considered without any regard to sec. 1342 and its Articles of War. That section and those articles being removed from the case, it follows inevitably that the judgment of the court below was radically wrong.

Section 1326 was enacted and must stand alone so far as furnishing a tribunal for the trial of cadets is concerned. If other statutes on the subject had existed, they were repealed or modified by that act, for it was plainly intended to cover the whole subject, and to prescribe the only rules which are to govern in respect to that subject. This is a well settled rule. *Tracy* vs. *Tuffly*, 134 U. S., 206, 223, and cases cited.

3. *Cadets are not "candidates merely."*

The court below held that cadets may be "described as candidates merely for commissioned officers." If we have shown that they are officers in the constitutional sense, and we think we have done so, it does not matter what descriptive words may be added.

True it is that a cadet on graduating would be appointed to a superior office and given a commission; so would a cadet in the naval academy, but the courts have all held such cadets to be officers, *not "candidates merely."*

If the view of the court below on this point be sound, it follows that all the cases we have cited which hold naval cadets to be officers should be overruled.

III.

Does the action for pay lie as brought?

We submit that it does, just as it did in *United States* vs. *Perkins*, 116 U. S. 483, where a naval officer was wrongfully dismissed, and was allowed to recover his pay. That is what appellant seeks to do in this case.

We conclude that the appellant was under the protection of sections 1229 and 1326, and that the President had no power to dismiss him, in the absence of the sentence of a court-martial to that effect.

As he was wrongfully and unlawfully dismissed, he is entitled to recover the pay which would have been his had he remained in the service during the period covered by the petition, and which the court below found to be $3,096, after deducting $144 for the benefit of the equipment fund. Finding VII; Rec. 9. Petition claims $3,417,00, Rec. 5.

For these reasons we respectfully submit that the judgment of the court below should be reversed.

W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THOMAS L. HARTIGAN
vs.
THE UNITED STATES. } No. 72.

Appeal From the Court of Claims.

REPLY BRIEF.

I

A cadet at the Military Academy is not an enlisted man.

1. Sec. 1094, Rev. Stat., enacts that the Army of the United States shall consist of certain named officers, regiments of artillery, cavalry, and infantry of specified numbers, certain departments, a corps of engineers, a battalion of engineer soldiers, enlisted men of the ordnance department, hospital stewards, a bureau of military justice, chaplains, a force of Indian scouts, officers on the retired list, one band stationed at the military academy, "and the professors and corps of cadets of the United States Military Academy."

That section establishes and divides the army. There is nothing in it to indicate the legislative purpose that a cadet in the military academy should be an enlisted man in any sense, or even perform the duties of an enlisted man. We know that enlisted men, not of the corps of cadets, are at the military academy and they are given extra pay for services rendered by them. For illustration see 31 Stat. 647.

2. We do not see how any one can read sections 1309 to 1341, inclusive, Rev. Stat., and then claim that a cadet at a military academy is an enlisted man. Those sections relate to and establish a military academy where the young men of the corps of cadets are instructed, to the end that they may intelligently and faithfully perform their duties as officers in the army of the United States. Those sections are utterly repugnant to the view that a cadet at that academy is an enlisted man.

II

Counsel for the United States, pp. 25 and 26, argues that the status of cadets at the naval academy is different from the status of cadets at the military academy, and contends that the *Perkins case*, 116 U. S. 483, is not applicable in principal to the case at bar, for the alleged reason that the articles of war for the Navy, in article 36, re-enacted section 1229, Rev. Stat. In that section there is this language: "And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court martial to that effect, or in commutation thereof." Art. 36 of the articles for the government of the navy, Rev. Stat., p. 282, is as follows: "No officer shall be dismissed from the

naval service except by order of the President or by sentence of a court martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court martial or in mitigation thereof."

The concluding sentence of sec. 1229, and the final clause of Art. 36, are the same in substance and effect, though the language differs slightly. We submit that the judicial interpretation of the two statutes must be the same, and that the naval cases cited in our original brief are equally applicable, in like circumstances, to cases of officers in the army.

III.

Counsel for the United States, pp. 27–29, insists that the president had the power to remove the appellant, unrestricted by sec. 1229, and that the removal of the claimant by the President, when ratified and confirmed by the Senate, bars this action.

The 3d and 4th findings of fact, Rec. 8–9 state that the claimant was dismissed July 27, 1883; and that, June 15, 1884, George W. Kirkman was appointed to succeed the claimant; that he was graduated from the Academy and appointed a second lieutenant in the army of the United States; his nomination to that office was confirmed by the Senate Dec. 20, 1889; and he was commissioned by the President Jan. 7, 1890. From the date of dismissal to the commissioning of Kirkman nearly six and one-half years elapsed. It was not until the confirmation of Kirkman that the Senate acted upon his appointment to the army.

Counsel for the Government relies on *Blake* vs. *U. S.*, 103 U. S. 227. That case holds that the President has the power to supercede or remove an officer of the army or navy by the appointment, by and with the

advice and consent of the Senate, of his successor. In the case at bar, the appointment of Kirkman was not brought to the attention of the Senate through his nomination until more than six years after the dismissal of the appellant, and even then the only question that the Senate could consider, in view of the facts of the case, was the propriety of confirming Kirkman. The Senate could not then go back to the dismissal of the appellant and decide whether or not he had been lawfully and properly dismissed, for, in the matter of the confirmation of Kirkman, the Senate was not to consider the displacement made more than six years before. If the appointment of Kirkman to the Military Academy had been subject to the confirmation of the Senate, and if the President had nominated Kirkman for cadetship to the Senate, and if the Senate had confirmed that appointment, it would have approved of the act of the President in dismissing the appellant here. But that is not this case. To bring the appellant under the doctrine of the *Blake*, *Mullan*, *Parsons* and *Shurtleff* cases cited on the brief filed for the Government, it would be necessary to show by fact and by law that the President nominated Kirkman *for the cadetship* to the Senate, that the Senate ratified his appointment, and thereby the President, with the approval of the Senate, dismissed this appellant.

We submit that this case is outside of the rule established by those cases—outside of it both in fact and in law.

IV.

Even if the Senate, in confirming the appointment of Kirkman as second lieutenant, ratified the act of

the President in dismissing the appellant, such ratification did not occur until nearly six years and a half after the dismissal, and until the date of that ratification the appellant must be held, as we think, to be an officer in the army of the United States, and entitled to pay.

W. W. DUDLEY,
L. T. MICHENER,
Attys. for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THOMAS L. HARTIGAN
v.
THE UNITED STATES. } No. 72.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a claim involving the right of a former cadet of the United States Military Academy at West Point, who was summarily dismissed by order of the President, to recover the pay of a cadet from the date of his dismissal, July 27, 1883, to July 1, 1889, amounting to over $3,000, upon the ground that the President had no authority to order his dismissal and, therefore, his dismissal was a nullity.

Thomas L. Hartigan, the claimant, entered the United States Military Academy on July 1, 1880, as a conditional cadet. On the day preceding his entrance, June 30, 1880, he took the required oath of office, set forth in full in the findings of fact of the Court of

Claims. (Rec., p. 7.) After he had successfully passed his semiannual examination he was given a certificate of appointment, dated February 10, 1881, also set forth in the findings of fact. (Rec., pp. 7 and 8.) On February 12, 1881, he entered into articles of agreement with the United States to serve for a period of eight years unless sooner discharged by competent authority, and to obey the legal orders of his superior officers and the rules and articles governing the Army of the United States. The contract is fully set forth in the findings of fact. (Rec., p. 8.) The twenty-first regulation of the Military Academy, 1883, required this contract to be signed by the cadet before receiving his certificate of appointment, and sections 1320 and 1321, Revised Statutes, require it before his admission to the Academy.

The claimant served in the Military Academy until July 27, 1883. After the annual examinations had been passed and while the corps of cadets was encamped at West Point, the claimant was, on July 27, 1883, summarily dismissed from the service of the United States by order of the President upon the charges of hazing a new cadet on guard duty, personating the officer of the guard, making use of the countersign, and disobedience of orders. (Rec., p. 8.)

After the dismissal, on July 27, 1883, of the claimant, George William Kirkman was appointed a cadet at the United States Military Academy from the Third Congressional district of Illinois on June 15, 1884, to succeed the claimant, and the said George William Kirkman was graduated from the Academy and appointed during a recess of the Senate to be second

lieutenant in the First Regiment of Infantry, United States Army, June 12, 1889. He was nominated to the Senate December 16, 1889, for the appointment of second lieutenant, dating from June 12, 1889. The nomination was confirmed by the Senate December 20, 1889, and he was commissioned by the President accordingly January 7, 1890, to rank from June 12, 1889. The said George William Kirkman is now a captain in the Twenty-fifth Regiment of Infantry, United States Army (Rec., pp. 8 and 9).

Some time between June 27, 1883, the date of claimant's dismissal from the United States Military Academy, and March 5, 1888, the date of claimant's first petition to the President, the claimant intermarried with some person whose name is not shown by the record (Rec., p. 9).

On July 30, 1883, the claimant addressed a statement and petition to the Adjutant-General of the United States Army requesting reinstatement in the cadet corps and a court-martial. On August 3, 1883, the claimant addressed another petition to the Secretary of War requesting reinstatement. The facts contained in neither of these two petitions were verified by affidavit, as required by section 1230 of the Revised Statutes. On April 21, 1888, the claimant, through the Secretary of War, and by the hand of Senator Cullom, presented a petition to the President requesting the revocation of the order of dismissal, an order for his trial by court-martial, and an order assigning and appointing him in the Army as of the

date of the assignment of the lowest grade of his class. None of these petitions were granted. (Rec., p. 9.)

The court gave judgment against the claimant, dismissing the petition, and this appeal is from such judgment.

ARGUMENT.

CLAIMANT NOT AN OFFICER WITHIN INTENT OF SECTION 1229, REVISED STATUTES.

The Court of Claims, speaking through Mr. Justice Weldon, in the opinion of the court in this case, held that a cadet in the Military Academy of the United States is not such an officer as is contemplated by section 1229, Revised Statutes, and therefore does not fall within the prohibition of the statute forbidding dismissal of an officer in the military or naval service in time of peace unless in conformity with the sentence of a court-martial. This opinion is abundantly supported, not only by the reasoning of the opinion, but also by the authorities cited, and hence the argument here presented upon that point will, of necessity, be in amplification.

HISTORY OF LEGISLATION RELATIVE TO MILITARY CADETS.

Cadets do not appear to have formed any part of the military establishment of the United States Army prior to the act of May 9, 1794, entitled "An act providing for raising and organizing a corps of artillerists and engineers," the third section of which provides:

> The organization of the said corps be as herein mentioned, to wit: One lieutenant-colonel commandant, one adjutant, one surgeon; four battalions, each to consist of one

> major, one adjutant and paymaster, and one surgeon's mate; and four companies, each to consist of one captain, two lieutenants, *two cadets with the pay, clothing, and rations of a sergeant*, etc. (1 U. S. Stat. L., 366.)

The only difference that this statute made between sergeants and cadets was one of title. Their pay was the same, their clothing was the same, and their rations were the same, and the sixth section of the act of July 16, 1798, entitled "An act to increase the Army, and regulating the pay thereof," provided—

> That the monthly pay of the noncommissioned officers, musicians, and privates, * * * shall be as follows: *Cadets, $10 per month and two rations per day*, etc.

Section 2 of the act of March 16, 1802, entitled "An act fixing the military peace establishment of the United States," provided—

> That each company (of artillery) to consist of one captain, one first lieutenant, one second lieutenant, *two cadets*, four sergeants, four corporals, four musicians, eight artificers, and fifty-six privates.

Section 4 provides for monthly pay as follows:

> * * * To each second lieutenant, twenty-five dollars; to each ensign, twenty dollars; *to each cadet, ten dollars;* to each sergeant-major, nine dollars; to each sergeant, eight dollars; to each corporal, seven dollars; to each teacher of music, eight dollars; to each musician, six dollars; to each artificer, ten dollars; and to each private, five dollars.

Section 11 provides:

> That the commissioned officers who shall be employed in the recruiting service, to keep up by voluntary enlistment, the corps as aforesaid, shall be entitled to receive for every effective able-bodied citizen of the United States, who shall be duly enlisted by him for the term of five years (giving qualifications): *And provided also,* That no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent, guardian, or master first had and obtained, if any he have. * * *

The section above quoted is significant in that it provides that only commissioned officers were to be employed in the duty of enlisting recruits, and that their duty was *to enlist all other members of the corps lower than the rank of a commissioned officer.*

Section 26 provides:

> That the President of the United States is hereby authorized and empowered, when he shall deem it expedient, to organize and establish a corps of engineers, to consist of one engineer with the pay, rank, and emoluments of a major; two assistant engineers with the pay, rank, and emoluments of captains; two other assistant engineers with the pay, rank, and emoluments of first lieutenants; two other assistant engineers with the pay, rank, and emoluments of second lieutenants, *and ten cadets with the pay of sixteen dollars per month and two rations per day;* and the President of the United

> States is in like manner authorized, when he shall deem it proper, to make such promotions in the said corps, with a view to particular merit and without regard to rank, so as not to exceed one colonel, one lieutenant-colonel, two majors, four captains, four first lieutenants, four second lieutenants, and so as that the number of the whole corps shall at no time exceed *twenty officers and cadets.*

Section 27 provides:

> That the said corps, when so organized, shall be stationed at West Point in the State of New York, and shall constitute a military academy; and the engineers, assistant engineers, *and cadets* of the said corps, shall be subject, at all times, to do duty in such places, and on such service, as the President of the United States shall direct. (2 Stat. L., pp. 132–137.)

It was not until the United States had again become involved in hostilities with Great Britain that any additional legislation was passed in regard to perfecting the establishment of the Military Academy at West Point. Accordingly, on April 29, 1812, an act of Congress was approved which established the Military Academy at West Point upon the lines which it has followed ever since.

Section 1 of the act of April 29, 1812, provides for the increase and reorganization of the Engineer Corps proper.

Section 2 provides for the corps of instructors at the Military Academy.

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Section 3 provides:

> That the cadets heretofore appointed in the service of the United States, whether of artillery, cavalry, riflemen, or infantry, or that may in future be appointed as hereinafter provided, shall at no time exceed two hundred and fifty; that they may be attached, at the discretion of the President of the United States, as students to the Military Academy, and be subject to the established regulations thereof; that they shall be arranged into companies of noncommissioned officers and privates, according to the directions of the commandant of engineers, and be officered from the said corps, for the purposes of military instruction; that there shall be added to each company of cadets four musicians; and the said corps shall be trained and taught all the duties of a private, noncommissioned officer, and officer, be encamped at least three months of each year, and taught all the duties incident to a regular camp; that the candidates for cadets be not under the age of fourteen nor above the age of twenty-one years; that each cadet, previously to his appointment by the President of the United States, shall be well versed in reading, writing, and arithmetic, and that he shall sign articles, with the consent of his parent or guardian, by which he shall engage to serve five years, unless sooner discharged; and all such cadets shall be entitled to and receive the pay and emoluments now allowed by law to cadets in the Corps of Engineers.

Section 4 provides—

> That when any cadet shall receive a regular degree from the academical staff, after going through all the classes, *he shall be considered as among the candidates for a commission* in any corps, according to the duties he may be judged competent to perform; and in case there shall not at the time be a vacancy in such corps, he may be attached to it, at the discretion of the President of the United States, by brevet of the lowest grade, as a supernumerary officer, with the usual pay and emoluments of such grade, until a vacancy shall happen: *Provided*, That there shall not be more than one supernumerary officer to any one company at the same time. (2 Stat. L., pp. 720–721.)

Section 3 of the act of June 18, 1878, provides—

> That hereafter all vacancies in the grade of second lieutenant shall be filled by appointment from the graduates of the Military Academy so long as any such remain in service unassigned; and any vacancies thereafter remaining shall be filled by promotion of meritorious noncommissioned officers of the Army, recommended under the provisions of the next section of this act: *Provided*, That all vacancies remaining, after exhausting the two classes named, may be filled by appointment of persons in civil life.

Previous to the establishment of military schools in the different countries where he served, the status of the cadet was well recognized and fixed. He was a young scion of nobility who served as a private in the

ranks in order to acquire a military education and experience in the practice of warfare, with the avowed purpose of obtaining a commission as an officer. He was actively engaged in the field against the enemies of his country, and endured the dangers and privations of a common soldier, from whom, indeed, he differed only in social rank and superior education. After the establishment of military schools the status of the cadet appears to have undergone a decided change, for while still a volunteer, with the sole purpose of acquiring a complete military education in order to secure a commission in the Army, his duties no longer compelled him to serve in an active campaign against the enemies of his country, but they now partook of the duties characteristic of the student, and even his military instruction was in the "arena of mimic warfare." A careful study of the evolution of the cadet would seem to establish the fact that he is a distinct species and a law unto himself. Nevertheless, in all the various changes through which he has passed he has preserved the distinctive character of "the younger brother" of the commissioned officer.

In the United States cadets appear to have come into existence as the connecting link between commissioned and noncommissioned officers—"candidates merely for commissioned officers"—in the language of the Court of Claims.

THE WEST POINT CADET AN ENLISTED MAN.

Considering the ultimate purposes for which cadets were educated and trained at the United States Mili-

tary Academy, it became of the highest importance that they should be placed under complete control of their instructors. This is of even more importance when the great cost to the Government of their education is taken into consideration. Complete obedience and subjection to control can in no other way be so effectually attained as by compelling cadets to enlist in the service of the United States, and thereby become subject to the Rules and Articles of War.

An enlistment is the act of making a contract to serve the Government in a subordinate capacity, either in the Army or the Navy. (*Erichson* v. *Beach*, 40 Conn., 283.)

An enlistment is a contract between the soldier and the Government, which involves, like marriage, a change in his status which can not be thrown off by him at his will, although he may violate his contract. By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties, and although he may violate his contract obligations, his status as a soldier is unchanged. (*In re Grimley*, 137 U. S., 147.)

The following sections of the Revised Statutes, regulating the admission of cadets to the United States Military Academy, are particularly pertinent here:

Section 1315 provides:

> The corps of cadets shall consist of one from each Congressional district, one from each Territory, one from the District of Columbia, and

ten from the United States at large. They shall be appointed by the President, and shall, with the exception of the ten cadets appointed at large, be actual residents of the Congressional or Territorial districts, or of the District of Columbia, respectively, from which they purport to be appointed.

Section 1317 provides:

Cadets shall be appointed one year in advance of the time of their admission to the Academy, except in cases where by reason of death or other cause a vacancy occurs which can not be provided for by such appointment in advance; but no pay or other allowance shall be given to any appointee until he shall have been regularly admitted, as herein provided; and all appointments shall be conditional until such provisions shall have been complied with.

SEC. 1320. Each cadet shall, previous to his admission to the Academy, take and subscribe an oath or affirmation in the following form:

"I, A B, do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty, or fealty I may owe to any State, county, or country whatsoever; and that I will at all times obey the legal orders of my superior officers, *and the rules and articles governing the armies of the United States.*"

And any cadet or candidate for admission who shall refuse to take this oath shall be dismissed from the service.

SEC. 1321. Each cadet shall sign articles, with the consent of his parents or guardian if he be a minor, and if any he have, by which he shall engage to *serve eight years unless sooner discharged.*

SEC. 1322. The Corps of Cadets shall be arranged into companies, according to the directions of the Superintendent, each of which shall be commanded by an officer of the Army, for the purpose of military instruction. To each company shall be added four musicians. The corps shall be taught and trained in all the duties of a private soldier, noncommissioned officer, and officer; shall be encamped at least three months in each year, and shall be taught and trained in all the duties incident to a regular camp.

SEC. 1323. Cadets shall be subject at all times to do duty in such places and on such service as the President may direct.

The articles which cadets were formerly compelled to sign are in the following form:

I, ———, aged ——, having been selected for an appointment as cadet in the Military Academy of the United States, do hereby engage, with the consent of my father, in the event of my receiving such appointment, that I will serve in the Army of the United States for eight years, unless sooner discharged by competent authority; and I, ———, do solemnly swear that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever,

and that I will observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

———— ————.

Sworn and subscribed to at ————, this —— day of ————, ——, before me.

The above contract is taken from the findings of fact of the court in the case of *Babbitt* v. *United States* (16 C. Cls. R., 204) affirmed by the Supreme Court (104 U. S., 767), and differs only slightly from the contract of the claimant.

A comparison between the foregoing and the sections of the Revised Statutes providing for the enlistment of private soldiers and prescribing the form of the articles of agreement to be signed by them seems instructive:

SEC. 1116. Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years at the time of their enlistment. This limitation as to age shall not apply to soldiers reenlisting.

SEC. 1117. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control.

SEC. 1118. No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of

(*any criminal offense*) (a felony) shall be enlisted or mustered into the military service.

SEC. 1119. All enlistments in the Army shall be for the term of five years.

Regulation 767 of the Army, 1881, provides that, "As soon as practicable, and at least within six days *after his enlistment, the* following oath will be administered to the recruit:"

> I, ———, born in ———, in the State of ———, aged —— years and —— months, and by occupation a ———, do hereby acknowledge to have voluntarily enlisted this —— day of ———, 190—, as a soldier in the Army of the United States of America, for the period of three years, unless sooner discharged by proper authority. And do also agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.
>
> ——— ——— [SEAL.]
>
> Subscribed and duly sworn to before me this —— day of ———, A. D. 190—.
>
> ——— ———.

It will be seen on comparison that the contract entered into by a cadet is almost identical with the

contract entered into by a private soldier. The Court of Claims in the *Harmon case* (23 C. Cls. R., 132), in considering the contract of a cadet midshipman, uses this language:

> It will be seen by reference to the twelfth finding that the obligation assumed by the cadet on his admission to the Academy is in consonance with the view of the law herein stated. The obligation on his part was to serve eight years, "unless sooner discharged by competent authority." * * * Obligations are not always mutual in the liability of the parties to perform. They are often unilateral, giving a right to one to declare the obligation at an end, while the other party is bound to a full performance.

The finding referred to by the Court of Claims is the contract which a cadet-midshipman executes upon entering the Naval Academy, and is almost identical with the contract which a cadet at West Point signs, although it does not appear that the statutes provide for such an obligation on the part of the cadet-midshipman.

The West Point cadet, after his enlistment, receives something that the private soldier does not receive, and which it has for years been the custom to give, though not authorized by law—a certificate of appointment—which reads as follows:

> *To all whom it may concern:*
>
> Know ye that the President has been pleased to appoint ——— a cadet of the United States Military Academy, to rank as such from the —— day of ———, 18—.

Given under my hand and seal, at the War Department, this —— day of ———, in the year of our Lord 18—, and of the Independence of the United States the ———.

———— ————,

Secretary of War.

The certificate given to a cadet by the Secretary of War, after his engagement, adds nothing to the material rights or standing of the cadet, and appears to have been given merely as evidence to establish his membership in the corps of cadets, and not as conferring any additional rights upon him.

The cadet enters into a contract with the Government to serve for eight years, *unless sooner discharged by competent authority, and to obey the orders of his superior officers according to the Rules and Articles of War.* In return he receives a salary of $500 per year and one ration a day, as provided for by section 1339 of the Revised Statutes. He also receives a thorough and complete education and military training. In this contract the appointing power reserves the right to discharge him at any time and for any reason that may seem proper, and the cadet is bound by his contract to acquiesce in that determination. On the contrary, if the appointing power should determine that the good of the service requires the cadet to serve the full time of his enlistment, he is compelled by the terms of the contract to submit also to that determination. In other words, *the contract is unilateral*, but is none the less binding on that account.

The first Attorney-General to give an opinion as to the status of cadets at West Point was Attorney-General Wirt. Reviewing the decision of a court-martial, he said:

> It is suggested by Colonel Hindman, on behalf of the court-martial, that these cadets are merely students. In one sense they are so; and so was the corps known under the name of artillerists and engineers; so was the original corps of engineers who constituted the Military Academy. For both, books, instruments, and apparatus for study were expressly provided by law; yet this character of students did not exempt them from a liability to martial law. But if the suggestion is intended to place these cadets on the footing of civil students, clothed with all their civil privileges and immunities, it is proper to remark that these cadets occupy a very different ground. *They are enlisted soldiers; they engage, like soldiers, to serve for five years, unless sooner discharged; they receive the pay, rations, and emoluments of sergeants;* they are bound to perform military duty in such places and on such service as the Commander in Chief of the Army of the United States shall order, and finally, by the act of the 3d of March, 1815, fixing "the military peace establishment of the United States," the corps to which they are attached, and of which they form a part, is expressly recognized as a part of the military establishment. (1 Opp. of Atty. Gen., 276, 290.)

Long after the above opinion was rendered, this court decided that service at West Point should be

taken into consideration in calculating the longevity pay of army officers, and used the following language in the case of *The United States* v. *Watson* (an appeal case from the Court of Claims), 130 U. S., pages 82–83:

> From this review of the statutes it can not be doubted that before the passage of the act of July 28, 1866 (now paragraph 1094, Revised Statutes, which in so many words classes the cadets at West Point as a part of the Army of the United States), as well as afterwards, the corps of cadets of the Military Academy was a part of the Army of the United States, and a person serving as a cadet was serving in the Army. * * * The practical construction of the requirement of the act of 1838, that the cadet should engage to serve for eight years, shown by the fact that the form of the engagement in this case was to "serve in the Army of the United States for eight years," is a circumstance of weight to show that the Government, from the beginning, treated the plaintiff as serving in the Army. The service for which he engaged began on the 1st of July, 1865, and the eight years ran from that time. That being his status, the acts of 1881 and 1882, in speaking of "actual time of service in the Army," cover the time of his service as a cadet. * * * Under the statutes involved in the present case, a cadet at West Point is serving in the Army as fully as an officer retired from active service is serving in the Army, under the statutes which apply to him, so far as the question of longevity pay is concerned.

During the war of the rebellion a corps of medical cadets was provided for by the act entitled "An act providing for the better organization of the military establishment," approved August 3, 1861.

The fifth section of said act provides—

> That there be added to the medical staff of the Army a corps of medical cadets, whose duty it shall be to act as dressers in the general hospitals, and as ambulance attendants in the field, under the direction and control of the medical officers alone. *They shall have the same rank and pay as the military cadets at West Point.* Their number shall be regulated by the exigencies of the service, at no time to exceed fifty. It shall be composed of young men of liberal education, students of medicine, between the ages of eighteen and twenty-three, who have been reading medicine for two years and have attended at least one course of lectures in a medical college. *They shall enlist for one year, and be subject to the Rules and Articles of War.*

Under this section the Judge-Advocate-General decided that the medical cadets, though not private soldiers nor noncommissioned officers, were clearly enlisted men. It is evident that this corps was added to the medical staff of the Army to meet the exigencies of the civil war, and their position in the Army was analogous to that of the cadets at the United States Military Academy.

The difficulty in fixing the status of a cadet at the United States Military Academy appears to have arisen from an effort to divide, by an ironclad rule, the

Army of the United States into three classes of men—private soldiers, commissioned and noncommissioned officers, whereas a careful examination of the statutes, by which the Army has been built up, would appear to indicate that there are at least four classes of men composing the Army—commissioned and noncommissioned officers, privates, and cadets.

THE CLAIMANT WAS NOT AN OFFICER WITHIN THE MEANING OF SECTION 1229, REVISED STATUTES.

The whole case of the claimant hinges upon one point, which put in the form of a question would read as follows: "Is a cadet at the United States Military Academy an officer within the meaning of section 1229 of the Revised Statutes?" which reads:

> SEC. 1229. The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment. And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.

That part of section 1229 under which the claimant contends that his dismissal from West Point by the President was illegal has been reenacted in article 99 of the Articles of War. The Articles of War is the code established for the government of the United States Army and Navy. The code for the Army was enacted under section 1342 of the Revised Statutes and

the code for the Navy was enacted under section 1624 of the Revised Statutes.

The claimant in his contract with the Government bound himself to obey the Articles of War, and thereby became amenable to the articles composing that code.

The Articles of War were enacted by section 1342, which provides:

> SEC. 1342. The armies of the United States shall be governed by the following rules and articles: The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include noncommissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial.

So far as the case at bar is concerned, it is only necessary to consider the above section and articles 4 and 99, enacted by it.

Article 4 provides:

> No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

And article 99 provides:

> No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof.

Section 1342 provides that the word officer, as used in the Articles of War, shall be understood *to designate a commissioned officer*, and that "the word soldier shall be understood to include noncommissioned officers, musicians, artificers, and privates, *and other enlisted men.*"

The Army, for the purposes of the Articles of War, is divided into two general classes—commissioned officers and soldiers; and in the enumeration of men included in the term soldier there is but one place where cadets can possibly enter and be governed by the Articles of War. They have bound themselves by contract to obey the Articles of War; therefore, in order to carry out the expressed will of Congress, they must come in under the term used in section 1342, "*and other enlisted men.*"

Cadets, being bound by the Articles of War, are bound by article 4, which authorizes the President, the Secretary of War, and the commanding officer of a department to discharge an enlisted man before his term of service has expired. A cadet at the United States Military Academy can not possibly be protected from discharge, by order of the President, by article

99, because the meaning of officer, as therein used, has been qualified by section 1342 of the Revised Statutes to mean *a commissioned officer*.

The Court of Claims has said, in the case of *Babbitt* v. *The United States* (16 C. Cls. R., 202), affirmed by this court (104 U. S., 767), that "cadets are not commissioned officers," and it is therefore impossible that cadets can be protected by section 1229 of the Revised Statutes, taken independently of article 99 of the Articles of War, because section 1342, by reenacting the provision that "officers, in time of peace, shall not be dismissed without a court-martial," and by defining what the word officer shall mean, has interpreted section 1229, and clearly indicates that Congress intended that only commissioned officers should be excepted from dismissal by the President alone.

The court also said in the case of Babbitt (*supra*), on pages 221 and 222:

> Prior to the Revised Statutes they were, like any other soldier, justiceable by a court-martial for any violation of the Articles of War. But the section introductory of the Articles of War in the Revised Statutes, section 1342, contains these words: "The armies of the United States shall be governed by the following rules and articles: The word 'officer,' as used therein, shall be understood to designate commissioned officers; the word 'soldier,' shall be understood to include noncommissioned officers, musicians, artificers, and privates, and other enlisted men;" and it is argued that as a cadet is not a commissioned or a noncommissioned officer, or a

> musician, artificer, or private, he is not subject to the Articles of War unless he is an enlisted man.
>
> This presents no real difficulty. No one supposes for an instant that Congress did not intend to subject the cadets to the Articles of War. If it were necessary, in order to carry into effect the undoubted legislative will, it might be held that *a cadet is an enlisted man for the purposes of section 1342 of the Revised Statutes*, but that he is not one in any other relation to statute law.

It has become necessary in this case that a cadet should be brought within the provisions of section 1342, and it is very evident that there is but one class under which he could possibly come in—that of *an enlisted man;* and the court has said that if that should ever be necessary, then *he is an enlisted man within the meaning of section 1342 of the Revised Statutes.*

STATUS OF CADETS AT THE NAVAL ACADEMY DIFFERENT FROM THE STATUS OF THOSE AT THE MILITARY ACADEMY.

There are a number of decisions fixing the status of cadets and noncommissioned officers in the Navy; but the conditions prevailing in the Navy have no analogy to those in the Army, for the reason that section 1624 enacting the Articles of War for the Navy simply provides that:

> The Navy of the United States shall be governed by the following articles: (Then follow the Articles of War.)

The provision of section 1229 of the Revised Statutes, reenacted in article 99 for the Army, has been reenacted in article 36 for the Navy.

Now, it will readily be seen that any kind of an officer might come within the protection of article 36 of the Articles of War for the Navy, because no attempt whatever has been made to qualify the word officer, and this court has held, in *Perkins* v. *The United States* (116 U. S., 483), that a cadet-engineer was one of those inferior officers whose appointment by the President alone was authorized by article 2, section 2, of the Constitution, and that he came within the protection of the provision of section 1229, which says that no officer shall be discharged in time of peace except by court-martial. The Perkins case is not applicable to the case at bar for the reason above stated, and also because cadet-engineers, when that class of cadets existed, were governed by rules, both upon their entrance and afterwards, very different from the rules governing cadets at West Point. For instance, there was no statute requiring them to enter into a contract to serve for eight years, *unless sooner discharged*, and sections 1394, 1403, and 1525 provide for the continuance of cadet-engineers in the Navy, unless discharged for inefficiency or dismissed for misconduct, but there are no such provisions protecting cadets at the United States Military Academy, or, for that matter, protecting cadet-midshipmen either.

THE CLAIMANT, WHATEVER HIS MILITARY STATUS, WAS NOT PROTECTED BY SECTION 1229, REVISED STATUTES.

Whether the military status of the claimant was that of an enlisted man or officer, in either event he was removed by the President in the exercise of ample authority, unrestricted by section 1229. Such power of removal from office is incident to the power of appointment. (*Ex parte Hennen*, 13 Pet., 259.) It is possessed by the President as a correlative of the power of appointment vested in him by the Constitution. Whether or not it is subject to statutory restriction by Congress remains as yet undecided by this court, but in every instance where such restriction has been attempted this court has construed such legislation with great strictness.

> *Blake* v. *United States*, 103 U. S, 227, 236, affirmed and followed in *Mullan* v. *United States*, 140 U. S., 240;
>
> *Parsons* v. *United States*, 167 U. S., 334, 335, 339, 341;
>
> *Shurtleff* v. *United States*, 189 U. S., 314.

In *Blake* v. *United States*, section 1229 received explicit construction by this court, the claimant, as in this case, having invoked its protection, and the court was of the opinion that the section should—

> be held to mean that whereas, under the act of July 17, 1862, as well as before its passage, the President alone was authorized to dismiss an army or naval officer from the service for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismissal would promote, the public service, he alone

> shall not, thereafter, in time of peace, exercise such power of dismissal, except in pursuance of a court-martial sentence to that effect, or in commutation thereof (opinion by Mr. Justice Harlan, p. 235).

and thereupon reached the conclusion that there was no purpose by this section "to withdraw from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of some one in his place" (p. 236).

It follows from this decision that the President has general power to summarily remove an officer of the Army; but that section 1229 is an attempt, the validity of which is not determined, to restrict the exercise of that power in time of peace to the execution of the sentence of a court-martial, *unless* the Senate of the United States cooperate in such removal. It seems clear from this interpretation that section 1229 was intended to apply only to commissioned officers, whose appointment by the President must receive confirmation by the Senate, since it is only in the case of a commissioned officer that the Senate could directly cooperate in his removal by the President through confirmation of the appointment of his successor. In this view of the statute, it leaves untouched the power of the President to remove such inferior officers of the Army as are appointed by the President alone. Accordingly, granting for the sake of argument that the claimant was some sort of an officer in the military service, yet since according to his own contention he was not

a commissioned officer, he can not invoke the protection of section 1229.

It should be observed in passing that, as is shown by the record, the removal of the claimant was ratified and confirmed by the Senate, so far as that body was able to cooperate in the same, by the confirmation of his successor after graduation from the Military Academy when nominated for the appointment of second lieutenant. (Finding IV, Rec., p. 8.)

THE REMOVAL OF THE CLAIMANT WAS NOT ONLY VALID BUT REASONABLE, AND AN EXERCISE OF SALUTARY AND NECESSARY DISCIPLINE.

In all private and State educational institutions throughout the United States the right of summary dismissal is vested in the academic boards, and no doubt this power has been conferred for good and sufficient reasons resulting from long experience in the work of education. It would seem that summary dismissals are of even more importance in the military and naval academies of the United States, taking into consideration the important and responsible positions which the students from those institutions are destined to eventually fill.

The real charge upon which the claimant in this case was dismissed was that of hazing a new cadet who was performing guard duty, one of the most serious offenses known to the academic regulations and one that has, perhaps, caused more trouble in the enforcement of discipline than any other, and one which has only recently caused Congress to pass an act of great severity for the punishment thereof.

Concerning this charge the Court of Claims say in their opinion:

> It is clear from the record here that claimant was deficient in conduct, for which he was dismissed, and, as we think, in conformity to the law we have recited.

It would seem necessary for the maintenance of discipline that the right of immediate dismissal should be placed in the hands of some responsible official. Such being the case, in whose hands could it be placed with less danger of injury to the interests of the Government or to the welfare of the cadets themselves, than in the hands of the Chief Executive of the Government, who is always directly responsible to the people for his acts.

Finally, the claimant having married some time between the date of his dismissal, July 27, 1883, and March 5, 1888 (Finding V, Rec., p. 9), was subject to dismissal under the eighteenth regulation of the rules and regulations for the United States Military Academy for the year 1883, which provides that—

> No married person shall be admitted as a cadet; and if any cadet shall be married before graduation, such marriage shall be considered as equivalent to a resignation, and he shall leave the institution accordingly.

LOUIS A. PRADT,
Assistant Attorney-General.

GEO. M. ANDERSON,
Assistant Attorney.

O

Supreme Court of the United States.

No. 72.—October Term, 1904.

Thomas L. Hartigan, Appellant, vs. The United States. } Appeal from the Court of Claims.

[January 3, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

Appellant filed a petition in the Court of Claims to have declared void his dismissal from the United States Military Academy at West Point, and for judgment for his pay as a cadet from July 27, 1883, to July 1, 1889, amounting to $3,417.

The appellant was duly appointed a cadet in the Military Academy on the 1st day of July, 1880, and served as such until the 27th of July, 1883, when he was summarily dismissed, by order of the President, upon charges of maltreating a new cadet upon guard, as well as other improper conduct. After the dismissal of appellant another cadet was appointed to succeed him, was duly graduated from the Academy, and appointed and commissioned a second lieutenant in the Army, and subsequently a captain of the Twenty-fifth Regiment of Infantry.

The appellant, subsequently to his dismissal, presented petitions respectively to the Adjutant General of the Army and to the Secretary of War, in which he asserted his innocence of the charges made against him, and prayed for reinstatement or trial by court-martial. He also presented a petition April 21, 1888, to the President, asking for a revocation of the order of dismissal, a trial by court-martial, and for an order assigning and appointing him to the Army as of the date of the assignment of the last graduate of his class. The petitions were all denied.

The Court of Claims held that he was not entitled to recover, and dismissed his petition. (38 Ct. Claims, 346.)

The contention of appellant is that, as a cadet, he was an officer in the Army, within the meaning of section 1229 of the Revised Statutes of the United States, and could only have been dismissed from the Academy upon trial and conviction by court-martial, as provided in that section.

That section provides as follows: "The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment. That no officer in the military and naval serv-

ice shall in time of peace be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

In the Articles of War, enacted by section 1342 of the Revised Statutes, the word "commutation" is changed to "mitigation." (Art. 99.)

The first impression of claimant's contention is that it ignores obvious distinctions, and makes a state of preparation for a position the same as the position itself, and claims its sanction for one who is not bearing its responsibilities or capable of discharging its duties. And an examination of the Revised Statutes relating to the organization of the Army confirms the impression.

Manifestly, it is impossible to reproduce all the sections of the Revised Statutes applicable to the military establishment, and we will only observe that they distinguish between the Army proper and the Military Academy, and make a distinction between an officer and a cadet. A few citations only are necessary.

Title XIV of the Revised Statutes of the United States provide for the organization of the Army of the United States. The name, rank and function of each officer is provided for, and section 1213 explicitly states when a cadet shall become an officer. That section enacts that when a cadet shall have regularly graduated from the Academy he "shall be considered a candidate for a commission in any corps for whose duties he may be deemed competent." He then becomes a commissioned officer. Prior to that time he is denominated a cadet, appointed as a cadet, and provision made for him under that name and state. He becomes an officer when he ceases to be a cadet; that is, when he has finished his pupilage; or, as section 1213 expresses it, when "he has gone through all his classes and received a regular degree from the academic staff" and commissioned. And his government while a cadet is provided for in chapter 5 of title XIV.

A cadet may be in the Army, (section 1094,) may be an officer in a certain sense as distinguished from an enlisted man, as it is contended by counsel for the Government he is, but nevertheless section 1229 does not apply to him. That section is one of a number of provisions for the organization and government of the Army, distinct from and having no relation whatever to the provisions for the government of the Military Academy and the cadets. Section 1229 is made part of, and the word "officer" given exact definition by section 1342, which provides as follows:

"SEC. 1342. The armies of the United States shall be governed by the following rules and regulations: The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial."

By article 99 it is enacted:

"No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof."

It is only a commissioned officer, therefore, who is entitled to the protection of a general court-martial, and a cadet is not a commissioned officer.

The argument of appellant, contending against this construction of the statute, is not easy to reproduce or make clear, and it involves the anomaly that there can be an officer in the Army of the United States who is not covered by the Articles of War, notwithstanding the declaration of section 1342, that the Armies of the United States shall be governed by those articles.

The object of the argument is to make independent section 1229 of section 1342, and to give a cadet the protection expressed by the former, on the ground that a cadet is an officer, but not a commissioned officer. That a cadet is an officer is deduced from the fact that he is appointed by the President, takes an oath to obey his "superior officers," and receives pay. But, as we have already intimated, it is not necessary to dispute that a cadet is an officer. Whether he is or not is not the question in the case. The question is, whether section 1229 applies to him, and to so construe it would seemingly give it no application except to cadets (and officers in the naval service,) and transfer it from the government of the Army to the government of the Academy; and, we may observe, would render the distinction implied by it between a time of peace and a time of war almost meaningless. It is nevertheless contended by appellant that section 1229 is unaffected by section 1342 and the Articles of War, but is a part of section 1326, which gives the Superintendent of the Academy the power to convene general courts-martial for the trial of cadets. In other words, the contention is that section 1326 is not merely a grant of power to the Superintendent of the Academy to convene courts-martial for the trial of cadets, but commands him to do so. And it would seem necessarily for every infraction of discipline. What, it may be asked, under the contention of appellant, is the relation between section 1326 and section 1325? By the latter section there can be deficiency in studies as well as conduct. Can there be no discharge from the Academy for deficiency in studies except upon and in pursuance of a court-martial to that effect?

The cases cited by appellant do not conflict with these views. *United States* v. *Morton*, (112 U. S. 1,) decides only that the time of service as a cadet was actual time of service in the Army within the meaning of the statutes giving longevity pay to officers. In *United States* v. *Baker*, (125 U. S. 646,) and *United States* v. *Cook*, (128 U. S. 254,) statutes giving longevity pay to officers in the Navy were construed, and it was held that a cadet

midshipman was an officer of the Navy. The reasoning of the court, however, has no application to the construction of sections 1229 and 1342.

The power of the President to dismiss a delinquent cadet we do not understand is questioned, except as that power is affected by sections 1229 and 1342. We may, however, refer to *Ex parte Hennen*, 13 Pet. 259; *Blake* v. *United States*, 103 U. S. 227, 236; *Mullan* v. *United States*, 140 U. S. 240; *Parson* v. *United States*, 157 U. S. 334; *Shurtleff* v. *United States*, 189 U. S. 314.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.